December 15th, 2021

The Honorable Bernard Dean  The Honorable Brad Hendrickson
Chief Clerk of the House  Secretary of the Senate
338B Legislative Building  412 Legislative Building
Olympia, WA 98504  Olympia, WA 98504

Dear Chief Clerk Dean and Secretary Hendrickson:

Please accept the enclosed report, submitted on behalf of Department of Natural Resources (department), as directed by the Legislature in the Sec. 310 (22) of the 2021-2023 Operating Budget (ESSB 5092, Chapter 334, Laws of 2021). The bill as passed directed the department to report to the appropriate committees of the Legislature by December 15th, 2021 on the status of rulemaking and resources needed to implement the Safe Harbor Agreement (SHA) rule for the Northern Spotted Owl. The report includes a status update on the programmatic development of the SHA and resources required to implement the rule by October 1st, 2022.

Should you have any questions, please contact me at 360-486-3469 or Brian.Considine@dnr.wa.gov

Sincerely,

Brian Considine
Legislative Director
Office of the Commissioner of Public Lands


cc:
Members of the Senate Agriculture, Water, Natural Resources & Parks Committee
Members of the House Rural Development, Agriculture & Natural Resources Committee
Members of the House Appropriations Committee
Members of the House Capital Budget Committee
Members of the House Environment & Energy Committee
Members of the Senate Environment, Energy, & Technology Committee
Members of the Senate Ways & Means Committee
Status of Development of a Programmatic Northern Spotted Owl Safe Harbor Agreement

Prepared by
Washington State Department of Natural Resources

Office of the Commissioner of Public Lands, Hilary Franz
Marc Engel, Forest Practices Senior Policy Planner and
Joseph Shramek, Forest Regulation Division Manager
December 15, 2021
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Executive Summary

This report summarizes the status of the development of a programmatic Safe Harbor Agreement (SHA) and includes an assessment of the resources necessary to implement it. The Forest Practices Board (Board) has found that the Northern Spotted Owl (NSO), state-listed as endangered and federally-listed as threatened, has continued to decline in Washington. For that reason, the Board, Washington State Department of Natural Resources (DNR) and the Washington Department of Fish and Wildlife (WDFW) are pursuing ways to provide Washington’s forest owners, large and small, with voluntary opportunities to provide meaningful conservation of NSO habitat while providing them with regulatory certainty.

The 2021-2023 Operating Budget contains proviso funding for DNR and WDFW to continue to develop a potential voluntary way to incentivize private forest owners to grow older forest to help recover NSOs. The text of the proviso (Senate Bill 5092 S.PL. Section 310) is as follows:

(22) $407,000 of the general fund—state appropriation for fiscal year 2022 is provided solely for the department to complete development of a programmatic safe harbor agreement, and the associated environmental analysis and draft enrollment language for inclusion in the forest practices rules. Within the amount provided in this subsection, the department must provide $182,000 to the department of fish and wildlife to assist in the development of the programmatic safe harbor agreement. The department must provide a report to the appropriate committees of the legislature by December 15, 2021, on the status of the rule making and the resources needed to implement the rule effective October 1, 2022.

Status of SHA development

The idea of a SHA has been under consideration and development since 2012. Conceptually, development can be thought of as comprised of six phases.

Phase 1: Development Work (completed) consisted of developmental work on a safe harbor concept by the Northern Spotted Owl Implementation Team and others. Phases 2 and 3 are in-progress, and Phases 4 through 6 consist of future rulemaking and other activities that depend on the outcomes and timing of completion of Phases 1 through 3 (Figures 1-3).

Phase 2: Legislative Authority (in progress) involves securing Legislative authority to empower DNR to negotiate and enter into an agreement with the federal government (specifically, the U.S. Fish and Wildlife Service or USFWS), so that DNR could ultimately be authorized by the USFWS to administer an approved SHA. DNR sought this permission in 2021 through Senator Stanford’s sponsorship of Senate Bill 5411, but the bill was not enacted.

Phase 3: Prepare Assessments and Mechanisms (in progress) consists of work, funded mainly through the proviso that is presently underway to finalize the draft SHA document, the associated environmental analysis, and the landowner enrollment mechanism. Through completion of this work by June 30, 2022, DNR will be poised to act quickly to formally engage
with the USFWS about gaining its approval for a programmatic SHA once DNR has the authority to do so (this will be Phase 4).

**Phase 4: Complete Safe Harbor Agreement (blocked)** through negotiations with USFWS and completion of the federal NEPA environmental assessment. Relatively little headway can be made toward finalizing a SHA and conducting rulemaking until Phase 2 is complete.

**Phase 5: Establish Forest Practices Rules (future activity)** and technical guidance once the agreement is complete.

**Phase 6: Staff the new program (future activity)** as well as conduct training and implement the program.

DNR assesses that it will take at least two-and-a-half years and up to three years to negotiate, staff up and implement a Safe Harbor Agreement program after Legislative action to provide DNR the necessary authorities in Phase 2 (Figure 2).

**Needed Resources**

To complement existing agency staff who are already devoted to this developmental process, additional staffing resources will be needed for DNR and WDFW to complete the development of the SHA and to implement the program once adopted. DNR intends to submit future funding decision packages for approximately $150,000 of one-time funding to assist with Board rulemaking, and $975,000 of mainly on-going funding for DNR and WDFW resources to implement the program.¹

SHA program implementation as currently envisioned will require three permanent positions:

- A DNR SHA Program Manager (as an anticipated requirement for an SHA with USFWS) responsible for: program implementation; compliance monitoring; effectiveness monitoring; and provision of technical assistance to landowners. This position is expected to be in the Natural Resource Specialist 4 classification.
- Two WDFW biologists to provide dedicated expertise and capacity to conduct baseline habitat assessments and to review and monitor landowner-planned forest management strategies for protecting existing NSO habitat and recruiting future habitat. These positions are expected to be in the Fish and Wildlife Biologist 3 or 4 classification.

¹ About $100,000 of the total is for one-time start-up expenses for vehicles, information technology equipment, field tools and so forth.

² Implementation duties are expected to include: establishing landowner baseline conditions; reviewing landowner plans; administering public notices and comments periods for formalizing plans; issuing Certificates of Inclusion; and preparing annual reports for USFWS and for DNR.
Why is a Safe Harbor Agreement Being Developed?

The proposed SHA is an outcome of the Board’s continued leadership efforts to provide landowners with voluntary conservation incentives and assurances regarding threatened and endangered species. Pursuit of a SHA was recommended by the Northern Spotted Owl Implementation Team that the Board formed as part of a 2008 settlement agreement between conservation interests, the timber industry, and the state. The implementation team found that strategic additions of NSO habitat can make meaningful contributions to the conservation of the species.

The Northern Spotted Owl Implementation Team also concluded that current NSO administrative rules act as a disincentive for forest landowners to retain older forests that would become suitable NSO habitat if continued to be grown to older ages. This is because landowners believe that by growing more habitat that may become occupied by NSOs, their risks under the federal Endangered Species Act (ESA) grow as well. The implementation team found that the risk to landowners could be mitigated through a SHA, and recommended that the Board pursue such an arrangement. The Board passed a motion accepting that recommendation.

An agreement by USFWS to authorize DNR to implement a programmatic SHA would provide Washington’s forest owners, large and small, the opportunity to voluntarily grow habitat on their lands in exchange for regulatory assurances against possible future changes under the ESA.

The agreement would be applicable to all non-federal forestlands within NSO territory in the state. DNR would administer the SHA, with WDFW providing technical expertise for evaluating NSO habitat and otherwise implementing the program.

Participants who elected to enroll in the SHA would do so under rules that the Board would adopt. Landowners who opted in could manage their lands for longer rotations, increasing the amount of suitable habitat available during the agreed-to term of enrollment. If a landowner later chose to opt out of the agreement, they could return to managing their lands under the state and federal laws and rules in place at that time without fear of “take” under the ESA.

Progress on Development of a Safe Harbor Agreement

There are six phases of activities required to advance and translate this concept into a useful tool that can incentivize forest landowners to grow older forests to benefit NSOs (Figure 1):

- Phase 1: Develop the SHA concept and conduct preliminary work. This phase has been finished through the work of the Northern Spotted Owl Implementation Team, Board, DNR, WDFW and others.
- Phase 2: Gain Legislative authority for the state to enter into a SHA with the federal government (In progress).
- Phase 3: Prepare draft SHA document, environmental assessment and landowner enrollment mechanism (In progress).
- Phase 4: Negotiate and complete a SHA agreement with the USFWS and complete the federal National Environmental Protection Act (NEPA) environmental assessment (Blocked until Phase 2 is complete).
- Phase 5: Establish applicable forest practices rules and technical guidance (Future activity).
- Phase 6: Staff the new program, conduct training and implement (Future activity).

Phase 1 has been completed, work is progress on Phases 2 and 3, and the timing and nature of Phases 4, 5 and 6 depends upon the outcomes of the prior phases.

*Figure 1. Programmatic SHA development phases and status as of December 2021.*

Completion of the overall SHA development, adoption, program development and training process is anticipated to be completed between two-and-a-half and three years after Legislative action to provide DNR the necessary authorities in Phase 2 (Figures 2 and 3).

**Phase 2: Gain Legislative authority for the state to enter into a SHA with the federal government**

Through Senator Stanford’s sponsorship of [Senate Bill 5411](https://www.leg.wa.gov/billsearch/ Bill?BillNumber=5411&Year=2021) in 2021, DNR sought permission that would allow the agency to request and enter into a SHA with the USFWS. Legislative-granted authority is needed for the federal government to transfer to DNR the administrative authority to provide regulatory incentives under the ESA to nonfederal forest landowners. If USFWS were to agree to DNR’s SHA proposal, it would then transfer administrative authorities to DNR through a programmatic permit under which DNR would enroll participants, issue certificates of inclusion, and implement and comply the program.
The authority sought in 2021 was also intended to:

- Allow WDFW to provide (a) technical assistance to DNR by conducting habitat assessments of candidate parcels; and (b) to assist with implementation of the SHA; and,
- Provide the Board with authority to adopt or amend forest practices rules as needed to implement the program.

Although the Legislature did not enact Senate Bill 5411 in 2021, the bill passed out of the Senate Committee on Agriculture, Water, Natural Resources and Parks. Additionally, the Legislature

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3 This would be accomplished through an interagency agreement with DNR.
took action through a proviso the 2021-2023 Operating Budget to provide funding necessary to complete work described under Phase 3.

**Phase 3: Safe Harbor Agreement finalization, environmental assessment and rule for enrollment**

Concurrent with the request for Legislative authority in 2021, DNR submitted a funding decision package for Phase 3 work (Appendix 1). This was done in recognition of a need for substantial highly-specialized expertise and capacity to finalize a draft SHA agreement, prepare the environmental assessment and determine how the SHA would ultimately be implemented. The Legislature funded this request through the Operating Budget proviso cited previously.

DNR is presently leading a team that includes a contractor and WDFW to complete this phase by the end of FY 2022. DNR and WDFW finalized an interagency agreement in October 2021 that specifies WDFW’s role and expected contributions in using the funding that was expressly provided in the budget proviso for this purpose. Also using that funding, DNR has hired an expert consultant to assist in areas before June 30, 2022:

- **Complete the development of the draft SHA document itself** - the document will describe the conservation benefit goals that will contribute to the recovery of the NSO and the required content of enrolled landowners’ individual management agreements describing how each landowner’s planned forest management activities are expected to contribute to the conservation goals;

- **Prepare and associated draft environmental assessment** – this will include analyses of environmental elements determined by USFWS to be necessary for inclusion in the federal National Environmental Protection Analysis (NEPA) that will be required before USFWS finalizes any agreement with DNR; and

- **Develop draft enrollment language for the inclusion in the forest practices rules** - this will describe how a landowner would enroll and the terms of enrollment. It is anticipated that the enrollment language will entail amending an existing rule for how a forest landowner can enter into a cooperative habitat enhancement agreement for state listed threatened and endangered species.5

The objective is for DNR to obtain “turnkey” documents from the contractor that can be provided to USFWS with DNR’s formal application for a programmatic SHA, so that USFWS has required specific information about the proposed SHA to conduct its internal analysis, including administering a NEPA review, producing a Biological Opinion and, ultimately, making a decision about whether or not to grant a SHA.

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4 DNR, WDFW and the contractor will meet with USFWS during Phase 3 to fully understand what USFWS needs in the environmental assessment.

5 DNR’s preliminary assessment is that the cooperative habitat enhancement agreement (CHEA) rule (WAC 222-16-105) may be modified to that it can be used as the instrument to enroll individual landowners in the SHA.
Phase 4: Negotiate and complete SHA agreement with USFWS and complete NEPA environmental assessment.

Assuming that the Legislature grants authority, DNR intends to formally request federal approval of the SHA. The work accomplished in Phase 3 will expedite that process. Completion of the environmental assessment analysis in Phase 3 will provide the information needed to address the elements that must be covered in the NEPA analysis. DNR’s formal request will be made after authority is granted. It is anticipated that six to nine months will be required to complete the process (Figure 2). Phase 4 work will be accomplished using existing DNR personnel.

Phase 5: Establish applicable forest practices rules and technical guidance.

After USFWS has transferred administrative authority to DNR, the Board can conduct rulemaking. To be conservative, it is assumed that completion of Phase 4 will require nine months. Rulemaking by the Board would then occur in three steps, each requiring a separate Board decision (Figure 3):

- **Step 1:** Completion of Phase 4, coupled with work previously accomplished during Phase 3 to prepare the draft enrollment language for the inclusion in the forest practices rules, will allow the Board to start consideration of rule adoption through direction to staff to file a CR-101 Pre-proposal Statement of Inquiry, and by directing DNR to prepare the rulemaking information packet that is required before the Board can take subsequent action to commence formal rulemaking.

- **Step 2:** It is anticipated that it will take nine-to-twelve months for DNR to develop the rulemaking packet needed by the Board to make a decision about whether to begin formal rulemaking. If so, it would direct DNR to file a CR-102 Proposed Rulemaking form to initiate formal rulemaking.

- **Step 3:** An additional six months would be needed for staff to: conduct public hearings and otherwise invite public comment on the rule proposal; consider what is learned from the hearings and comments; and prepare a concise explanatory statement for the Board to use in deciding whether or not to adopt a rule. The rule, if adopted, would become effective about two months later per the Code Reviser’s schedule.

In total, Steps 2 and 3 are anticipated to require about seventeen-to-twenty months. DNR intends to carry out its work in this phase using existing Board staff supplemented with temporary additional staffing as described in the subsequent section on resource needs.

Phase 6: Staff the new program, conduct training and implement.

Training for the new program is integral to successful implementation and use leading toward the sought-after benefits. Plans for how staff, tribes, stakeholders and landowners would be trained will be described the rule implementation plan provided to the Board before it adopts a rule (Figure 3). This will be carried out by the same DNR staff involved in Phase 5, complimented by additional existing training and operations personnel from within the Forest Regulation Division.
Implementation planning will be accomplished by DNR so that training and educational materials are available as soon as the Board adopts a new rule. It will be carried out over a three-month period by existing DNR staff with invited participation from WDFW and others.

Resources Needed for Implementation

To support the development and implementation of this SHA, DNR intends to prepare funding decision packages for future Operating Budgets. It anticipates seeking approximately $150,000 of one-time expenses to support rulemaking, and $975,000 for three permanent positions to carry out the program on an on-going basis.

One-time resource need expenses

Additional staff capacity will be needed for DNR to perform the rulemaking activities described for Phase 5. The need is assumed to be for an Environmental Planner 3 or 4, and the estimated one-time cost is $150,000.

On-going resource need expenses

Implementation of the program as envisioned will require addition of three permanent positions after legislative authority is established:

- A DNR SHA Program Manager (this is an anticipated requirement for an SHA with USFWS) who will be responsible for: program implementation; compliance monitoring; effectiveness monitoring; and provision of technical assistance to landowners. This position is expected to be in the Natural Resource Specialist 4 classification.

- Two WDFW biologists to provide dedicated expertise and capacity to conduct baseline habitat assessments, and to review and monitor landowner planned forest management strategies intended to protect and retain existing habitat that is not part of the baseline, or to recruit and retain future NSO habitat. These positions are expected to be in the Fish and Wildlife Biologist 3 or 4 classification.

Relying on the timeline presented previously, DNR would hire the program manager two years after legislative authority is established, and WDFW would hire the biologists six months later. The program manager would finalize development of the operational program as the Board completes its rulemaking process, assist with planning the training, and work with WDFW on the recruitment of the biologists. The estimated cost for the first biennium is approximately $975,000 (including about $100,000 of one-time start-up costs for these new, permanent field-oriented positions). DNR would administer the SHA, and funding for the biologists would be provided to WDFW through an interagency agreement.

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6 This is based in part on a staff workload assessment that assumes there will be an average of 1,250 acres enrolled each year.

7 Implementation duties are expected to include: establishing landowner baseline conditions; reviewing landowner plans; administering public notices and comments periods for formalizing plans; issuing Certificates of Inclusion; conducting compliance and effectiveness monitoring; and preparing annual reports for USFWS and for DNR.
Appendix 1 – 21-23 Budget Session Decision Package for NSO

Safe Harbor Agreement

Agency Recommendation Summary

This proposal accompanies an anticipated bill to amend Chapter 76.09 RCW that would authorize the Department of Natural Resources (DNR) to enter into a programmatic Safe Harbor Agreement (SHA) with the federal government to facilitate habitat conservation for northern spotted owl (NSO)s on private and state forest lands. The objective is to add a means to incentivize private landowners to take voluntary actions to restore, enhance or maintain NSO habitat. This proposal requests $225,000 of one-time funding to hire a contractor to help DNR complete development of the programmatic SHA and perform the environmental analysis.

Fiscal Summary

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Decision Package Description

In 2008, the Forest Practices Board (FPB) responded to the risk of potential litigation by creating a northern spotted owl policy working group (PWG) to develop meaningful incentives for landowners to provide spotted owl habitat where it is needed.

In 2010, the FPB, based on consensus recommendations from the PWG, requested that DNR form a Northern Spotted Owl Implementation Team (NSOIT) to develop a plan to implement the consensus recommendations. The NSOIT was asked to “develop customized, voluntary incentive packages on a landowner-by-landowner basis for specific owl sites inside and outside of Spotted Owl Special Emphasis Areas (SOSEAs). Agreements would be developed on a situation-by-situation basis and would include appropriate Endangered Species Act assurances, such as protection against future restrictions provided through a safe harbor agreement …” The NSOIT is chaired by the DNR (chair) and includes representatives from the Washington Department of Fish and Wildlife (WDFW), forest landowners and interested stakeholders, and the U.S. Fish and Wildlife Service.

In November 2012, the FPB further requested the NSOIT to evaluate a voluntary “opt-in” process for forest landowners to enter into programmatic agreements to gain federal assurances for forest management options to assist in the recovery of NSOs.

In 2017, as the NSOIT was evaluating potential agreements between the state and federal government, DNR obtained legal advice that indicated that legislative authority to enter into conservation agreements with the federal government was lacking. To address that, it is anticipated that legislation will be introduced for the 2021 session to amend Chapter 76.09 RCW and authorize DNR to enter into a programmatic SHA with the federal government to provide incentives for forest landowners to restore, enhance, or maintain habitats for the NSO.

Anticipating the new authority, this proposal is for one-time funding for DNR hire a contractor to:

- work with the forest practices program, WDFW, NSOIT, stakeholders tribes and federal agencies to finalize a programmatic NSO SHA for Washington; and
- perform the required environmental assessment of the effects of the NSO SHA for the federal services.
**Assumptions and Calculations**

*Expansion, Reduction, Elimination or Alteration of a current program or service:*

This request is intended to help DNR exercise anticipated new authority under Chapter 76.09 RCW to promote conservation of the federally and state-listed NSO.

**Detailed Assumptions and Calculations:**

The Forest Practices Division is requesting $225,000 to hire a contractor with specialized expertise to provide the services described previously in the “package description” section.

**Workforce Assumptions:**

The contractor is anticipated to work under the direction of the Assistant Division Manager for Policy and Landowner Services.

*How is your proposal impacting equity in the state?*

This package does not in itself have any obvious equity implications, though its conservation incentives might benefit rural communities.

**Strategic and Performance Outcomes**

**Strategic Framework:**

The legislative action to authorize DNR to enter into agreements with the federal government, under the Endangered Species Act, and supporting FPB rulemaking supports the *Department of Natural Resources Strategic Priorities*:

**DNR Strategic Plan Goal D1:** Lands and water that can remain productive and adapt to changing conditions, including climate change and a growing population.

**Strategy D1.3:** Expand efforts to ensure sustainable food and fiber production by conserving working farms and forests, securing water resources, and protecting high-productivity soils in the face of population growth.

This program is connected to the Governor’s priority initiative:

**Results WA Goal:** Keep Puget Sound Ecosystem Healthy and Combating Climate Change

**Performance outcomes:** The Forest Practices Board, through research and recommendations from the NSOIT and DNR, has found that the NSO has continued to decline in Washington. To address this, a voluntary opt-in programmatic SHA will support the habitat incentives priorities outlined in the NSOIT’s recommendations to the Board, as well as help to remove disincentives for growing habitat that may become occupied by NSOs and thus present an incidental take risk for landowners.

The enhanced NSO conservation outcomes resulting from the SHA will benefit all Washingtonians. The SHA is fundamentally no different than the Forest Practices Habitat Conservation Plan and incidental take permit that the State developed through legislative appropriations and has maintained since 2006 on behalf of private and state forest landowners.

**Performance Outcomes:**

The Forest Practices Board, through research and recommendations from the NSOIT and DNR, has found that the NSO has continued to decline in Washington. To address this, a voluntary opt-in programmatic SHA will support the habitat incentives priorities outlined in the NSOIT’s recommendations to the Board, as well as help to remove disincentives for growing habitat that may become occupied by NSOs and thus present an incidental take risk for landowners.

The enhanced NSO conservation outcomes resulting from the SHA will benefit all Washingtonians. The SHA is fundamentally no different than the Forest Practices Habitat Conservation Plan and incidental take permit that the State developed through legislative appropriations and has maintained since 2006 on behalf of private and state forest landowners.
Other Collateral Connections

State Workforce Impacts:

N/A

Intergovernmental:

Tribal governments are likely to support this proposal. WDFW is expected to support the proposal provided that implementation does not require the agency to provide additional services without additional resources. Potential support from counties is unknown, but they may express concerns that the implementation of the SHA will result in changing the timing of delivery of timber excise tax revenues that partially fund county governments over a longer period of time.

State Facilities Impacts:

N/A

Changes from Current Law:

This proposal accompanies anticipated legislation that would add a statute to Chapter 76.09 RCW authorizing DNR to enter into an agreement with the federal government, under the ESA, to restore, enhance, and maintain habitats for the NSO. Creation of such a statute would require the FPB to adopt forest practices rules to create and implement an NSO SHA.

Puget Sound Recovery:

N/A

Legal or Administrative Mandates:

This proposal is in response to a recognized need by the NSOIT for legislation authorizing the state to enter into agreements with the federal government, under the ESA, to restore, enhance, and maintain habitats for species such as Northern Spotted Owl, which is a federally listed species.

Stakeholder Response:

The conservation caucus is likely to support this proposal. The small forest landowner caucus is expected to support the proposal, but uncertainty exists as to the level of support in the absence of specific financial incentives that are unavailable at present. It is unknown to what extent industrial forest landowners will support the proposal, but that caucus is thought to be supportive or neutral if the small forest landowners support the proposal.

IT Addendum

Does this Decision Package include funding for any IT-related costs, including hardware, software, (including cloud-based services), contracts or IT staff?

No
Objects of Expenditure

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Agency Contact Information

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obe@dnr.wa.gov